United States Department of Labor
Employees' Compensation Appeals Board

VIVIAN SMITH, Appellant	)	
and	)	**Docket No. 04-174**
	)	**Issued: April 14, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Jacksonville, FL, Employer	)	

Appearances:
Vivian Smith, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 22, 2003 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated September 30, 2003, refusing to reopen her claim for further merit review. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has nonmerit jurisdiction over the September 30, 2003 decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 30, 2001 appellant, then a 49-year-old postal distribution clerk, filed an occupational disease claim alleging she developed interstitial lung disease as a result of her employment duties. In her narrative statement, appellant stated that she had been a flat sorter clerk with the employing establishment for 13 years and that during this time she developed seasonal asthma and type two diabetes. In September 2001 she was assigned to work on a

machine called the 100. Appellant explained that, in order to use this machine properly, she was required to use her bare hands, and that shortly after she began working with the machine, she began experiencing severe negative reactions including cuts and abrasions on her hands that would not heal and daily, rather than once yearly, coughing, gagging and shortness of breath. Appellant stated that she discussed her change in condition with her physician, and it was concluded that "the machine fuel (tow motor, 100, flat sorter etc. dust) was more than likely a high factor" in the cause of her condition. Appellant asserted that, despite her requests to be transferred to another location, she remained assigned to operate the machine 100, resulting in her subsequent hospitalization. Appellant stated that, because of her condition, she is now on heavy doses of steroids, her diabetes has progressed to type one, and she must take blood pressure medication.

In support of her claim, appellant submitted records from St. Vincent's Hospital dated October 28 and November 6, 2001, in which Dr. Kevin W. Berger[1] noted that appellant was admitted to the hospital from September 26 to October 2, 2001, at which time she was diagnosed with interstitial lung disease and was discharged after treatment with prednisone. Dr. Berger stated that, on October 28, 2001, appellant was readmitted to the hospital with a recurrence of incapacitating coughing and dyspnea. She was treated with medication, underwent a lung biopsy and was discharged. Dr. Berger did not discuss the cause of appellant's condition, or the results of her biopsy.

In a consultation report dated October 30, 2001, Dr. Michael K. Bluett, a Board-certified thoracic surgeon also associated with St. Vincent's Hospital, noted that appellant had a long-standing history of progressive interstitial lung disease. He stated that recent biopsy and culture results were normal, but that diagnostic imaging revealed diffuse interstitial disease predominantly in the upper lobes of her lungs. Dr. Bluett diagnosed progressive interstitial lung disease and recommended that appellant undergo an open lung biopsy in an effort to determine the possible cause of her condition. Dr. Bluett noted that appellant was a postal employee and was a remote smoker, five cigarettes per day, but did not otherwise address the relationship of these factors, if any, to her condition.

In a report dated October 16, 2001, a physician[2] with the Shands Jacksonville Family Practice Center stated that appellant had severe lung disease "possibly connected with her exposure at work" and was totally disabled for employment until further notice. In a second undated note, the same physician stated that appellant was having repeated asthma attacks and that "apparently they are triggered by occupational exposure. It appears that certain areas of the work environment are more prone to cause those attacks. My recommendation would be to avoid those areas during work."

In addition, appellant submitted the results of a November 3, 2001 chest x-ray showing the continued presence of bilateral pulmonary infiltrates.

[1] The physician's qualifications could not be ascertained.

[2] The physician's signature is illegible.

By letter dated January 25, 2002, the Office informed appellant that the evidence she had submitted was insufficient to establish her claim, because her treating physicians did not relate her diagnosed conditions to specific factors of her employment. The Office asked that appellant submit a comprehensive medical report from her treating physician which included an opinion, with supporting medical explanation, as to whether specific elements of appellant's job caused or contributed to her condition. The Office left the record open for 30 days for the submission of such evidence. No additional evidence was received from appellant.

In a decision dated September 27, 2002, the Office denied appellant's claim finding that she failed to provide sufficient evidence to establish that her diagnosed lung condition is causally related to her employment.

By letter dated August 17, 2003, appellant, through counsel, requested reconsideration of the Office's prior decision and submitted additional medical evidence in support of her request.

In a decision dated September 30, 2003, the Office denied appellant's request for reconsideration on the grounds that the request neither raised substantive legal questions nor included new and relevant evidence, and, therefore, was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (i) showing that the Office erroneously applied or interpreted a specific point of law; (ii) advancing a relevant legal argument not previously considered by the Office; or (iii) constituting relevant and pertinent new evidence not previously considered by the Office.[3] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4]

ANALYSIS

The only decision before the Board in this appeal is that dated September 30, 2003, in which the Office denied appellant's application for merit review. As more than one year had elapsed between the date of the Office's most recent merit decision dated September 27, 2002 and the filing of appellant's appeal postmarked October 16, 2003 and received by the Board on October 22, 2003, the Board lacks jurisdiction to review the merits of appellant's claim.[5] In her letter requesting reconsideration, appellant asserted that the Office's prior decision was contrary

[3] 20 C.F.R. § 10.606(b)(2) (1999).

[4] 20 C.F.R. § 10.608(b) (1999).

[5] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed. Section 501.2 provides that the Board's review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. The Board is unable to consider evidence for the first time on appeal; *see Marlene K. Cline*, 43 ECAB 580 (1992).

to fact and law; however, appellant did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third above-noted requirement under section 10.606(b)(2), however, the Board notes that appellant did submit new and relevant medical evidence from Dr. Alan E. Kravitz, a Board-certified internist. In a report dated July 31, 2003, he stated that he had reviewed certain health records pertaining to appellant's condition but had not examined appellant. Dr. Kravitz noted appellant's employment history and further noted that she had been a "very light smoker, *i.e.*, one pack per seven to ten days, in the past, *i.e.*, less than one pack year total before she completely quit in 1998." He also referenced appellant's complaints of developing severe symptoms subsequent to beginning work on the machine 100. Dr. Kravitz noted that all of the physicians whose records he reviewed agreed that appellant had an idiopathic pulmonary fibrosis, not atypical interstitial lung disease. He further noted that no one could quite identify the pathogenic or etiology of her disease and that one Board-certified pulmonologist stated that appellant's condition was "too complicated for him to handle." With respect to the cause of appellant's condition, Dr. Kravitz stated:

> "[Appellant] had pulmonary fibrosis. To a reasonable degree of medical certainty, this pulmonary fibrosis was initiated along with her asthma by her work, specifically her change in work to 'machine 100.' The biopsies including that reported September of 2001 show minimal chronic inflammation with rare acute active fibrosis. Simply stated, this indicates a recurring problem refractory to steroid and immunosuppressive therapy. To say that [she] now has a chronic problem absent her work is correct. It is also correct to state that she has idiopathic pulmonary fibrosis, ongoing, initiated by her work…. To a reasonable degree of medical certainty, I believe her pulmonary fibrosis and her asthma are related to her work environment as stated on the D.O.L. records."

In a supplemental report dated September 2, 2003, Dr. Kravitz provided additional details regarding appellant's work on the machine 100, and her failed attempts to be reassigned to another location. The physician concluded: "It is her thought that this 'machine 100' and working around it was the etiology of her interstitial lung disease. I can find no other etiologic cause of this problem."

On reconsideration, appellant also submitted an undated, unsigned memorandum which states:

> "(1) Employee states that pulmonary disease came from work, irritant dust. (2) Employee has progressive pulmonary fibrosis. (3) Fishman's [p]ulmonary [d]iseases and [d]isorders indicates a multiplicity of causes of pulmonary fibrosis, one of which is toxic exposure. Dust in a postal facility constitutes toxic exposure, as does the patient's symptoms. (4) Pathological (biopsy) reports clearly state an ongoing condition. The patient's clinical course is progressively downhill from (1) the disease, and (2) the consequent hypertension, diabetes and obesity, **ASSOCIATED WITH THE TREATMENT OF THE DISEASE**.

(Emphasis in the original.) The diagnosis 'diffuse interstitial disease, interstitial pulmonary disease,' and a multitude of other diagnoses, are consistent with this lady's disease. Accordingly, it is my opinion that [appellant's] work at the [employing establishment] and the change in her job on or about September 21, 2001 was the cause of this malady, to a reasonable degree of medical certainty."

The Board finds that the reports of Dr. Kravitz have not been previously considered by the Office and are relevant to the issue of whether appellant's interstitial pulmonary fibrosis was due to her employment. Therefore, appellant met the requirements for requesting reconsideration under 20 C.F.R. § 10.606(b)(1) and (2)(iii).[6]

With respect to the final evidence of record, the undated and unsigned memorandum, as it is written on plain paper without letterhead, it is impossible to ascertain whether this memorandum is from a physician or from a lay person connected with the claim. Causal relation is a medical question that can generally be resolved only by medical opinion evidence.[7] Therefore, this piece of evidence is insufficient to warrant merit review.

As the Office failed to review Dr. Kravitz's new reports which are relevant to the issue in this case, it improperly denied appellant's request for further merit review. The September 30, 2003 decision will be set aside and the case remanded for consideration of all of this evidence.

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

[6] *See Claudio Vazquez*, 52 ECAB 496 (2001).

[7] *Robert G. Morris*, 48 ECAB 238 (1996).

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action in accordance with this decision of the Board.

Issued: April 14, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member